Supreme Court, U.S.
FILED

97 1857 MAY 19 1998

OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

October Term, 1997

BONNIE VELASCO, *et al.*,

Petitioners,

vs.

WILLIAM F. FAIRALL,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

MATT P. LAVINE
Attorney for Petitioners
10801 Lockwood Drive
Suite 190
Silver Spring, Maryland 20901
(301) 754-0100

146404

(800) 274-3321 • (800) 359-6859
A DIVISION OF COUNSEL PRESS

Lutz Appellate Services, inc.

40 pp

QUESTION PRESENTED FOR REVIEW

1. In cases brought under 42 U.S.C. § 1983, is summary judgment appropriate to grant qualified immunity to a police officer who has failed to note the address on a search warrant and directs the entry to the wrong address?

PARTIES TO THE PROCEEDING

The Petitioners are Bonnie Velasco, her husband, Jamie Velasco, and their children Darren and Dru Velasco. They were the plaintiffs in the United States District Court for the District of Maryland and the Appellants in the United States Court of Appeals for the Fourth Circuit.

The Respondent is William Fairall.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Parties to the Proceeding	ii
Table Contents	iii
Table of Citations	iv
Opinions Below	1
Statement of Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	2
A. The Evidence	2
B. The Rulings	4
Reason for Granting the Writ	5
I. The Circuits Conflict As To The Standard For Granting Qualified Immunity, Through Summary Judgment, In Cases Brought Under 42 U.S.C. § 1983, When A Police Officer Has Executed A Search Warrant On The Wrong Residence.	5
Conclusion	9

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Castro v. United States, 34 F.3d 106 (2nd Cir. 1994) . 8

Dawkins v. Graham, 50 F.3d 532 (8th Cir. 1995) 7

Hartsfield v. Lemacks, 50 F.3d 950 (11th Cir. 1995) .. 6, 7

Hill v. McIntyre, 884 F.2d 271 (6th Cir. 1989) 8

Maryland v. Garrison, 480 U.S. 79 (1987) 6

Pray v. City of Sandusky, 49 F.3d 1154 (6th Cir. 1995) 8

Richardson v. Oldham, 12 F.3d 1373 (5th Cir. 1994) . 8

Statutes Cited:

28 U.S.C. § 1254 1

42 U.S.C.§ 1983 ..... i, 1, 5

United States Constitution Cited:

Fourth Amendment 2, 6

Contents

Page

APPENDIX

Appendix A — Opinion Of The United States Court Of Appeals For The Fourth Circuit Decided February 6, 1998 ..... 1a

Appendix B — Order And Memorandum Of The United States District Court For The District Of Maryland Dated September 12, 1996 ..... 7a

Appendix C — Order Of The United States Court Of Appeals For The Fourth Circuit Denying Petition For Rehearing Filed March 23, 1998 ..... 24a

OPINIONS BELOW

On September 12, 1996, the United States District Court for the District of Maryland granted summary judgment against the Petitioners.

On February 6, 1998, the United States Court of Appeals for the Fourth Circuit affirmed the lower court.

On March 23, 1998, the Fourth Circuit denied the Petition for Rehearing.

The Orders and Opinions were not published; they appear in the Appendix to this Petition.

STATEMENT OF JURISDICTION

Petitioners seek review of the Opinion of the United States Court of Appeals for the Fourth Circuit. Jurisdiction is conferred on this Court through 28 U.S.C. § 1254. In accordance with the Rules of the Supreme Court of the United States, this Petition was timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Velascos have sought relief under 42 U.S.C. § 1983, which states in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof, to the deprivation of any rights, privileges, or

> immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law. . . .

Under the Fourth Amendment to the United States Constitution, the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ."

STATEMENT OF THE CASE

It is not disputed that William Fairall, a police officer, directed the execution of a search warrant at the home of an innocent family. It is not disputed that Fairall failed to look at the address listed on the search warrant before taking this action.

In the District Court, Fairall explained his misconduct was the product of a miscommunication. In granting summary judgment on the officer's qualified immunity, the District Court accepted the officer's explanation. The Fourth Circuit, in affirming, joined the lower court in ignoring the conflicts and illogic of the explanation.

While the United States Court of Appeals for the Fourth Circuit has thus ruled that the credibility and explanation of the officer are not subject to challenge, other circuits, in reviewing similar cases, have concluded that summary judgment was inappropriate. This Petition should be granted to determine the propriety of the Fourth Circuit's view.

A. The Evidence

Jamie Velasco is an officer in the United States Secret Service. On the night of October 23, 1991, he was attending the bachelor party of a fellow officer. His wife, Bonnie Velasco, and their two children, Darren and Dru, were at the family's home, located at 14823 Belle Ami Drive in Laurel, Maryland.

At approximately 10:30 p.m., Bonnie, Darren and Dru were upstairs. The children were asleep in their bedrooms, and Bonnie was preparing to take a shower. Hearing a noise downstairs, Bonnie descended the staircase. Suddenly, the front door blew apart, and several men, carrying rifles and dressed in black, rushed into the Velascos' home.

Screaming, Mrs. Velasco ran upstairs. One of the armed men confronted her, but she managed to run past him and down the hall to protect her children. Choosing between her children, she threw herself on top of her daughter and begged for mercy.

No shots were fired. Slowly, the men retreated. William Fairall entered the Velascos' home. He told Mrs. Velasco that the men were police officers and that he had directed them to the wrong house. Standing in what was left of her doorway, Bonnie Velasco could hear the men enter the house a few doors away.

Indeed, Fairall had been the Sergeant in charge of executing a search warrant, on October 23, 1991, for 14827 Belle Ami Drive, Laurel, Maryland, and had directed the team of officers to 14823 Belle Ami Drive. There had been no exigency as the warrant was part of another department's ongoing investigation.

Prior to the night in question, Fairall had not been involved in any surveillance of the location identified in the warrant. When he arrived to the area, Fairall assembled the officers in his command to a location out of sight of the targeted house.

Of the officers assembled, only Detective Joseph Thomas had been involved in the investigation pertaining to the search warrant. Only Detective Thomas had the warrant. Only Detective Thomas was familiar with the target. Fairall, however, did not defer to or consult with Detective Thomas. In fact, Fairall

directed Detective Thomas to an area where Thomas could neither see nor communicate with Fairall.

Instead, Fairall went to the parking lot in front of the townhouses that included the target. Fairall called Cpl. Speake on his car radio. Fairall allegedly recited the last two digits of the Velascos' address, and the Corporal replied by repeating these numbers. From this communication, Fairall explained in the District Court that he had understood that Cpl. Speake was confirming the address identified in the warrant. Yet Cpl. Speake neither had the warrant nor knew any aspect of the underlying investigation.

Fairall stated that he had read the last two digits of the Velascos' address posted next to the Velascos' front door. Yet Fairall also testified that he could not see the addresses posted on the houses. Fairall admitted he did not check the warrant for the correct address. In fact, neither he nor the Corporal had the warrant.

The Velascos' home and the target were both townhouses within the same row. Each townhouse had a distinctive color scheme and structural amenities, such as the size, shape, and location of windows. Most important and noteworthy to the preparation for the potentially dangerous entry into a house, each had a distinctive layout of the stairs leading to the front door. At the target, the stairs enter from the side to a landing at the front door of the target house. Far easier access is accomplished to the Velascos' home, where the stairs lead directly to the front door.

B. The Rulings

Ignoring these factual conflicts and questions, the United States District Court for the District of Maryland (Chasanow,

J.) reversed its prior rulings and granted the Defendant's Motion for Summary Judgment. To the District Court, Fairall's actions were objectively reasonable, thereby protecting the officer through his qualified immunity. The trial judge, accepting Fairall's explanation for entering the Velascos' home, concluded that his conduct amounted to a mere mistake rather than plain incompetence. The District Court skipped over the issue of the officer's good faith, since he had never relied on the warrant to locate the residence.

The United States Court of Appeals for the Fourth Circuit affirmed this decision. It, too, ignored the logical necessity of checking an address before entering a person's home. More to the point, the Fourth Circuit failed to acknowledge that, at the very least, the Sergeant's explanation defied logic and included self-conflicting testimony. The Petition for Rehearing was thereafter denied.

REASON FOR GRANTING THE WRIT

I.

THE CIRCUITS CONFLICT AS TO THE STANDARD FOR GRANTING QUALIFIED IMMUNITY, THROUGH SUMMARY JUDGMENT, IN CASES BROUGHT UNDER 42 U.S.C. § 1983, WHEN A POLICE OFFICER HAS EXECUTED A SEARCH WARRANT ON THE WRONG RESIDENCE.

In its Opinion, the Fourth Circuit accurately noted that qualified immunity is extended to officers who have made "good faith mistakes" and to protect "all but the plainly incompetent". *See* 4a. Therefore, Fairall's conduct was to be examined to determine

> whether it was "objectively understandable and reasonable" and whether "the officer's conduct was

> consistent with a reasonable effort to ascertain and identify the place intended to be searched within the meaning of the Fourth Amendment."

See 4a, quoting from *Maryland v. Garrison*, 480 U.S. 79, 88-89 (1987).

The Fourth Circuit also accurately noted that summary judgment is only appropriate when the non-movant has failed to present adequate evidence of the claim. *See* 2a. There was no dispute that the Fourth Amendment was violated when Fairall directed others into the Velascos' home without a warrant.

In the Fourth Circuit, however, Fairall's call to the Corporal was adequate to merit qualified immunity. The Fourth Circuit chose to ignore that neither the Corporal nor Fairall possessed a copy of the warrant, thereby making their communication irrelevant to the task of confirming the address of the targeted house. That Fairall denied an ability to read the addresses — including the Velascos' — plainly posted at the door of each home was given no consideration. Further, the Fourth Circuit expressed no concern over Sgt. Fairall's refusal to utilize the only officer at the scene with knowledge of the target.

The Fourth Circuit's view of summary judgment is erroneous. Furthermore, the Fourth Circuit is alone among the Circuits that have reviewed similar situations. Thus, this Petition should be granted to clarify which view is correct.

Hartsfield v. Lemacks, 50 F.3d 950 (11th Cir. 1995) involves a set of facts remarkably similar to the case at bar. After Deputy Sheriff Mike Newton observed his confidential informant buy illegal drugs at 5108 Middlebrooks Drive, he obtained a search warrant. On the following day, Newton, leading a team of officers, executed the warrant on 5128 Middlebrooks Drive.

While the lower court granted Newton's motion for summary judgment, the Eleventh Circuit reversed. The Court of Appeals considered the officer's failure to check the address on the warrant to preclude summary judgment. As the Court concluded,

> Given the per se rule against warrantless searches and the guidance of the Garrison court's description of reasonable police efforts, all reasonable police officers should have known that Newton's acts — searching the wrong residence when he had done nothing to make sure he was searching the house described in the warrant — violated the law.

50 F.3d at 955. The Eleventh Circuit noted that at least one house separated the two in question. Also, only one had a fence around the yard. Further, the addresses were clearly marked on the houses. Finally, no exigency existed, as the raid was planned well in advance.

In *Dawkins v. Graham*, 50 F.3d 532 (8th Cir. 1995), masked and armed police officers entered 611 Adam Street, rather than 611 Byrd Street. In upholding the lower court's denial of summary judgment, the Eight Circuit noted the difference in the color of the houses and the type of cars parked nearby. These differences were "objective facts available to the officers". Moreover, the officers' conduct involved a "material question of fact about whether the officers' entry of the [ ] home was a mistake amounting to plain incompetence." 50 F.3d at 535.

The Second Circuit has reversed even the prospective entry of summary judgment on qualified immunity. In *Castro v. United States*, 34 F.3d 106 (2nd Cir. 1994), police officers conducted a search of Castro's apartment based on an informant's tip regarding a different apartment. Using the same analysis as if a

warrant had been issued for a different residence, the Second Circuit ruled that "factual questions as to whether targeting Castro's apartment was a mistake [ ] bespoke plain incompetence." 34 F.3d at 113.

In *Hill v. McIntyre*, 884 F.2d 271 (6th Cir. 1989), Officer Robert McIntyre of the Detroit Police Department intended to obtain a search warrant for 256 Philip Street. Instead, he identified the address incorrectly as 258 Philip Street, the home of the Hill family. At the close of the Hills' case, the trial court directed the verdict in favor of the police officer.

In reversing, the Sixth Circuit decided that the officer's error failed to qualify as reasonable. Of critical importance was the officer's failure to note various differences between the two houses. The court remanded the case for trial so that a jury could decide whether the officer had exercised the "proper degree of care" in selecting the house to be searched. 884 F.2d at 276. *Cf. Pray v. City of Sandusky*, 49 F.3d 1154 (6th Cir. 1995) where the officers executing the warrant had no knowledge that a duplex was composed of two separate living quarters; and *Richardson v. Oldham*, 12 F.3d 1373 (5th Cir. 1994) where the target and searched house bore the same address and physical characteristics.

The "material question of fact", that the Eight Circuit viewed as precluding summary judgment, was the very one that the lower court decided in the case at bar. In reaching its conclusion, the lower court completely ignored the "objective facts available" to the Defendant, such as the physical differences between the houses, the location of the stairs, the color schemes, and the posted addresses.

CONCLUSION

In deciding whether to grant qualified immunity to a police officer, the Fourth Circuit has decided that summary judgment is appropriate, despite a plethora of facts and inferences that bespeak the officer's incompetence. The view of the Second, Sixth, Eighth, and Eleventh Circuits are plainly otherwise. Thus, this Petition should be granted to resolve the conflict.

Respectfully submitted,

MATT P. LAVINE
Attorney for Petitioners
10801 Lockwood Drive
Suite 190
Silver Spring, Maryland 20901
(301) 754-0100

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DECIDED FEBRUARY 6, 1998

UNPUBLISHED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 96-2448

BONNIE VELASCO; JAMIE VELASCO; DRU VELASCO, by and through her Mother, Bonnie Velasco; DARREN VELASCO, by and through his Mother, Bonnie Velasco,

Plaintiffs-Appellants,

v.

WILLIAM F. FAIRALL,

Defendant-Appellee.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Deborah K. Chasanow, District Judge. (CA-94-282-DKC)

Submitted: December 9, 1997

Decided: February 6, 1998

Before WIDENER, HALL, and WILKINS, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Appendix A

* * *

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Bonnie Velasco filed suit pursuant to 42 U.S.C. § 1983 (1994), on behalf of herself and her minor children against City of Laurel Police Officer William F. Fairall. She alleged that he violated their Fourth Amendment rights by mistakenly ordering an Emergency Response Team ("ERT") into their house which conducted an unreasonable search. Velasco further alleged loss of consortium as a result of the constitutional violations. This appeal arises from the district court's order of summary judgment in favor of Fairall on all claims. We affirm.

Summary judgment is appropriate against a party who fails to make a showing sufficient to establish the existence of an element essential to her case, and on which she will bear the burden of proof at trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). We view the facts in the light most favorable to the nonmoving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

The record discloses that Fairall was responsible for the execution of a search and seizure warrant at 14827 Belle Ami Drive. After briefing with the ERT, Fairall drove by the target residence, with the understanding that it was the sixth door in from the end of a townhouse row and near a hexagonal window. After identifying a residence fitting that description, Fairall

positioned himself near the perceived target residence and attempted to verify with the ERT leader that 14823 was the correct number of the target residence. Due to a misunderstanding, however, Fairall took the ERT leader's response to his verification request as confirmation that 14823 was the correct residence.

The ERT entered the Velasco residence, located at 14823 Belle Ami Drive, at approximately 10:30 p.m. At the time, Velasco and her minor children were sleeping. Velasco awoke hearing loud noises and observed three men wearing masks and carrying firearms enter through the front door. While running to her daughter's room to protect her, she noticed one of the intruders enter her son's room. The men left after realizing they entered the wrong residence.

Fairall entered the Velasco residence and identified himself and the other men as police officers executing a search warrant for a different residence. He apologized for the intrusion and for mistakenly entering her home. Fairall secured the front door and assured Velasco that she would be reimbursed for any damages.

Velasco first maintains that Fairall's action in mistakenly sending the ERT into her home violated her Fourth Amendment rights. The district court awarded summary judgment to Fairall on the ground that he was entitled to qualified immunity without addressing whether the Velascos' Fourth Amendment rights were violated. We review de novo the district court's grant of summary judgment based on a finding of qualified immunity. *See Pritchett v. Alford*, 973 F.2d 307, 313 (4th Cir. 1992).

Police officers sued under 42 U.S.C. § 1983 are not entitled to qualified immunity if, in performing discretionary functions,

they engage in conduct that violates " 'clearly established constitutional rights of which a reasonable person would have known.' " *Pritchett*, 973 F.2d at 312 (quoting *Harlow v. Fitzgerald* , 457 U.S. 800, 818 (1982)). The factors to be considered in ruling on a qualified immunity defense are (1) identification of the specific right allegedly violated; (2) whether the right was clearly established at the time of the alleged violation; and (3) if so, whether a reasonable person in the officer's position would have known that his actions would violate that right. *Id.* "The tolerance . . . accorded by the qualified immunity defense to 'good faith' mistakes of judgment traceable to unsettled law, or faulty information, or contextual exigencies, is deliberately designed to give protection to 'all but the plainly incompetent or those who knowingly violate the law,' . . . in order to avoid undue inhibitions in the performance of official duties." *Id.* at 313 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). A police officer is entitled to qualified immunity if a reasonable officer possessing the same information would have believed his conduct was lawful. *See Shaw v. Stroud*, 13 F.3d 791, 801 (4th Cir. 1994). The Fourth Amendment clearly provides the Velascos a right to privacy in their own home and to be secure in it. *See Maryland v. Garrison*, 480 U.S. 79, 86 (1987). The reasonableness of the officer's mistake in executing the warrant depends upon whether it was "objectively understandable and reasonable" and whether "the officer['s] conduct was consistent with a reasonable effort to ascertain and identify the place intended to be searched within the meaning of the Fourth Amendment." *Id.* at 88-89.

Here, Fairall drove by the target residence and later identified the residence based on the description he received. He attempted to verify the address but due to miscommunication erroneously assumed the response as confirmation. Because

Fairall took reasonable steps to ensure that the ERT entered the correct residence and a reasonable officer under similar circumstances would believe he was acting lawfully, Fairall is entitled to qualified immunity. We affirm summary judgment on this claim.

Velasco also maintains that Fairall is liable under 42 U.S.C. § 1983 for ERT's unreasonable conduct. Because there is no evidence that Fairall was personally involved in the actual search of the home, only supervisor liability can lie. *See Lopez v. Robinson*, 914 F.2d 486, 494 (4th Cir. 1990). Supervisor liability under 42 U.S.C. § 1983 may be imposed when (1) the supervisor had actual or constructive knowledge that his subordinate was engaged in conduct that posed a pervasive and unreasonable risk of constitutional injury to citizens like the plaintiff; (2) the supervisor's response to the knowledge was so inadequate as to show deliberate indifference to or tacit authorization of the alleged offensive practices, and (3) there was an affirmative causal link between the supervisor's inaction and the particular constitutional injury suffered by the plaintiff. *See Shaw*, 13 F.3d at 799.

In the instant case, there is neither allegation nor evidence that the ERT engaged in similar conduct in the past much less that it was widespread. As such, there is no evidence that Fairall was aware of ERT's conduct or that he demonstrated inaction in the face of widespread abuses by the ERT. *See id.* Hence, the district court properly granted summary judgment on the claim of supervisor liability, concluding that even if the ERT's conduct violated the Velascos' Fourth Amendment rights, Fairall could not be held responsible under a supervisor liability theory. Because Fairall is not liable to the Velascos for ERT's mistaken entry into their home and their subsequent search, the district

court properly granted summary judgment on the loss of consortium claim.

Accordingly, we affirm the district court's judgment. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

APPENDIX B — ORDER AND MEMORANDUM OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND DATED SEPTEMBER 12, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. DKC 94-282

BONNIE VELASCO, *et al.*,

Plaintiffs,

v.

WILLIAM F. FAIRALL,

Defendant.

ORDER

For the reasons stated in the accompanying Memorandum Opinion, IT IS this 12th day of September, 1996, by the United States District Court for the District of Maryland, ORDERED that:

1. Defendant's motion for summary judgment BE, and the same hereby IS, GRANTED;

2. Judgment BE, and the same hereby IS, ENTERED in favor of William F. Fairall and against Bonnie Velasco, Jamie Velasco, Dru and Darren Velasco;

The Clerk is directed to close this case; and

4. The Clerk will mail a copy of the foregoing Memorandum Opinion and Order to counsel for the parties.

s/ Deborah K. Chasanow
DEBORAH K. CHASANOW
United States District Judge

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. DKC 94-282

BONNIE VELASCO, *et al.*

Plaintiffs,

v.

WILLIAM F. FAIRALL,

Defendant.

MEMORANDUM OPINION

Plaintiffs Bonnie Velasco, Jamie Velasco, Dru Velasco, and Darren Velasco brought this action pursuant to 42 U.S.C. § 1983, against Defendant City of Laurel Police Officer Sgt. William Fairall. Plaintiffs allege that Sgt. Fairall violated their rights under the Fourth Amendment to the United States Constitution by mistakenly ordering the Emergency Response Team ("ERT") into the wrong house and by the unreasonable fashion in which the ERT conducted the search and seizure.[1] Plaintiffs also allege that these constitutional violations resulted in loss of consortium. Presently pending and ready for resolution is Defendant's motion for summary judgment. (Paper No. 19). Plaintiffs filed an opposition, (paper No. 20), and Defendant filed a reply. (Paper No. 21). No hearing is deemed necessary, and the court now rules pursuant to Local Rule 105(6).

1. Pursuant to this court's Order on October 31, 1994, the court will not proceed with claims arising under the Fifth Amendment.

Appendix B

I. BACKGROUND

At approximately 10:30 p.m., on October 23, 1991, Plaintiffs Bonnie Velasco, Darren Velasco, and Dru Velasco were at home in their town house located at 14823 Bell Ami Drive. Darren and Dru, the minor children, were asleep in their respective bedrooms on the second floor of the town house. Bonnie Velasco, the mother of Darren and Dru, was in her bedroom which was also on the second floor.

At about 10:30 p.m. Bonnie Velasco heard a loud noise. Thinking the noise came from her son's bedroom, she went to his room. After hearing another noise, thinking it was from the kitchen, Bonnie Velasco went downstairs. She then heard another noise and saw about three men enter her front door. Bonnie Velasco alleges that at no time did the men identify themselves. The men were dressed completely in black wearing masks and carrying firearms.

Bonnie Velasco ran upstairs and into her bedroom while being followed by one of the intruders. Bonnie Velasco then ran into her daughter's bedroom in an effort to protect Dru. At that point, she saw another person with a gun drawn enter her son's room. After an unspecified period of time, but no longer than five minutes, the intruders began to leave her house.

At this time, Defendant Sgt. Fairall, dressed in plain clothes, entered Plaintiffs' home and ordered the rest of the officers out. He then identified himself and the men as police officers acting under the authority of a search warrant for a different house. Defendant apologized for mistakenly executing the warrant on Plaintiffs' house, and asked if Bonnie Velasco was "O.K." Bonnie Velasco responded that she was fine, but that she was shaken

up. Defendant Fairall offered to secure the broken front door and did so with Bonnie Velasco's permission. Defendant Fairall assured Bonnie Velasco that she would be reimbursed for the damage caused by the officers, and then left.

II. DISCUSSION

A. STANDARD OF REVIEW

It is well established that a motion for summary judgment will be granted only if there exists no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The moving party bears the burden of showing that there is no genuine issue as to any material fact. Fed. R. Civ. P. 56(c); *Pulliam Inv. Co. v. Cameo Properties*, 810 F.2d 1282, 1286 (4th Cir. 1987) (citing *Charbonnages de France v. Smith*, 597 F.2d 406, 414 (4th Cir. 1979)). If there clearly exist factual issues "that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party," then summary judgment is inappropriate. *Anderson*, 477 U.S. at 250; *see also Pulliam Inv. Co.*, 810 F.2d at 1286; *Morrison v. Nissan Motor Co.*, 601 F.2d 139, 141 (4th Cir. 1979); *Stevens v. Howard D. Johnson Co.*, 181 F.2d 390, 394 (4th Cir. 1950). In addition, "summary judgment is inappropriate even if merely the inferences to be drawn from the facts are in dispute." *United States ex rel. Milam v. Regents of University of California*, 912 F. Supp. 868, 874 (D. Md. 1995); *see also Morrison*, 601 F.2d at 141 ("Summary judgment under Rule 56, Fed.R.Civ.P. should be granted only where it is perfectly clear that there is no dispute about either the facts of the controversy or the inferences to be drawn from such facts."); *Charbonnages*, 597 F.2d at 414.

When ruling on a motion for summary judgment, the court must construe the facts alleged in the light most favorable to the party opposing the motion. *United States v. Diebold Inc.*, 369 U.S. 654, 655 (1962); *Gill v. Rollins Protective Servs. Co.*, 773 F.2d 592, 595 (4th Cir. 1985). A party who bears the burden of proof on a particular claim must factually support each element of his or her claim. "[A] complete failure of proof concerning an essential element . . . necessarily renders all other facts immaterial." *Celotex Corp.*, 477 U.S. at 323. Thus, on those issues on which the nonmoving party will have the burden of proof, it is his or her responsibility to confront the motion for summary judgment with an affidavit or other similar evidence. *Anderson*, 477 U.S. at 256.

In *Celotex Corp.*, the Supreme Court stated:

> In cases like the instant one, where the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the "pleading, depositions, answers to interrogatories, and admissions on file." Such a motion, whether or not accompanied by affidavits, will be "made and supported as provided in this rule," and Rule 56(e) therefore requires the nonmoving party to go beyond the pleading and by her own affidavits, or by the "depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial."

Celotex Corp., 477 U.S. at 324. However, " 'a mere scintilla of evidence is not enough to create a fact issue.' " *Barwick v. Celotex Corp.*, 736 F.2d 946, 958-59 (4th Cir. 1984) (quoting *Seago*

v. North Carolina Theaters Inc., 42 F.R.D. 627, 632 (E.D.N.C. 1966), *aff'd*, 388 F.2d 987 (4th Cir. 1967), *cert. denied*, 390 U.S. 959 (1968)). There must be "sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50 (citations omitted).

B. THE CLAIMS

Plaintiffs have asserted three different claims. The first is that Defendant's mistake in ordering the ERT into Plaintiffs' home violated their Fourth Amendment rights. Second, they claim that the ERT conducted their search in an unreasonable fashion which also violated their Fourth Amendment rights. The last claim is for a loss of consortium arising from these alleged violations.

1. LIABILITY FOR SENDING ERT INTO WRONG HOUSE

Plaintiffs allege that Defendant, by incorrectly ordering the ERT into their house, violated their Fourth Amendment rights. Defendant argues that no Fourth Amendment violation occurred when the ERT, due to an honest mistake, entered the wrong residence pursuant to an otherwise valid warrant and left upon realizing their error. Alternatively, Defendant argues that qualified good faith immunity entitles him to summary judgment on this § 1983 claim.

In cases such as this, it is not easy to discern the proper line between conduct that does not violate the Fourth Amendment at all, and conduct that meets the test for qualified immunity.

Both standards employ variations on the concept of objectively reasonable police behavior, with only a slightly different focus. In the circumstances present here, because the court finds that Defendant is entitled to summary judgment at least on the basis of qualified good faith immunity, it is unnecessary to decide with any finality the merits of the alleged Fourth Amendment violation.

"The test of qualified immunity for police officers sued under 42 U.S.C. § 1983 is whether, in performing discretionary functions, they have engaged in conduct that violates 'clearly established constitutional rights of which a reasonable person would have known.' " *Pritchett v. Alford*, 973 F.2d 307, 312 (4th Cir. 1992) (quoting *Harlow v. Fitzgerald*, 457 U.S. 300, 813 (1982)). In Pritchett, the Fourth Circuit articulated the test for determining whether the defense of qualified immunity is appropriate:

> Ruling on a defense of qualified immunity . . . requires (1) identification of the specific right allegedly violated; (2) determining whether at the time of the alleged violation the right was clearly established; and (3) if so, then determining whether a reasonable person in the officer's position would have known that doing what he did would violate that right.

973 F.2d at 312. A police officer is entitled to prevail on an assertion of qualified immunity unless a reasonable officer possessing the same information would have known his conduct was unlawful. *Shaw v. Stroud*, 13 F.3d 791, 801 (4th Cir. 1994), *cert. denied*, __ U.S. __, 115 S. Ct. 68 (1994) (citing *Slattery v. Rizzo*, 939 F.2d 213, 216 (4th Cir. 1991)). The tolerance

accorded by the qualified immunity defense to " 'good faith' " mistakes of judgment is "deliberately designed to give protection to 'all but the plainly incompetent or those who knowingly violate the law,' in order to avoid undue inhibitions in the performance of official duties." *Pritchett*, 973 F.2d at 313 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986), and citing *Anderson v. Creighton*, 483 U.S. 635, 638 (1987)).

Because qualified immunity is designed to shield officers not only from liability but also from the burdens of litigation, "its establishment at the pleading or summary judgment stage has been specifically encouraged." *Pritchett*, 973 F.2d at 313 (citing Harlow, 457 U.S. at 815-19).

The first step in applying the good faith test is to determine whether the right the officer is alleged to have violated was clearly established in the particular sense facing the officer:

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, see *Mitchell* [*v. Forsyth*, 472 U.S. 511, 535 n. 12 (1985)]; but it is to say that in the light of preexisting law the unlawfulness must be apparent. See, *e.g.*, *Malley* [*v. Briggs*, 475 U.S. 335, 344-45 (1986)]; . . .

Anderson v. Creighton, 483 U.S. 635, 640 (1987). The Fourth Amendment standard governing searches of premises mistakenly thought to be covered by a valid warrant was articulated in *Maryland v. Garrison*, 480 U.S. 79 (1987):

whether the officers' mistake was "objectively understandable and reasonable," and whether "the officers' conduct was consistent with a reasonable effort to ascertain and identify the place intended to be searched." *Id.* at 88. As *Garrison* was decided prior to the search in this case, the right implicated here, the right not to be subjected to the *unreasonable* mistaken execution of a valid search warrant, was clearly established at the relevant level of particularity.

The next question is whether a reasonable officer in the Defendant's position could have thought his conduct to meet that standard. Reference to the facts in other cases addressing similar circumstances will assist.

In *Samuels v. Smith*, 839 F.Supp. 959 (D. Conn. 1993), on facts much like those here, Chief Judge Cabranes granted summary judgment to officers who entered the wrong first floor apartment through a back door after misinterpreting a signal (wave) from the team at the front door. The warrant covered the apartment next to the one entered, but the suspect entered the neighboring apartment, rather than her own, after receiving a package of marijuana. The officers at the front, who were most familiar with the warrant and the layout of the premises, signaled to the officers in the back that the woman had gone into the apartment on the left. The officers in back assumed that the signal meant that the apartment on the left was the one covered by the warrant and they entered it. Under these circumstances, the trial judge concluded that there had been no Fourth Amendment violation, not merely that the officers were entitled to good faith immunity. *Samuels*, 839 F. Supp. at 965.

On the other side of the line is *Dawkins v. Graham*, 50 F.3d 532 (8th Cir. 1995). The police entered and searched a

house on the wrong street, but with the same house number as in the warrant. Two officers, who knew the address to be searched and the proper route to get there, and who had previously been to the house, turned a block too soon despite clear street signs and the early evening hour in October. They had been told that the suspect was in the house and that a pink Camaro sports car was at the address. When they arrived at the wrong house, only a partially pink van was present. The officers, who were in radio contact with the rest of the search team, did not call to check the discrepancies, but entered. Under these circumstances, the court concluded that the existence of "objective facts available to the officers at the time of the raid distinguishing the premises [entered] from the premises [in the warrant]" meant that a jury would have to decided whether they should have known they were entering the wrong house, and thus upheld the trial court's denial of summary judgment for the defendants on the merits of the plaintiffs' Fourth Amendment claims. *Dawkins*, 50 F.3d at 534-35. The court also upheld the denial of summary judgment on qualified immunity grounds, finding that there was a "material question of fact about whether the officers' entry of the [plaintiffs'] home was a mistake amounting to plain incompetence." *Id.* at 535.

Another case with sufficiently distinguishing features is a *Hartsfield v. Lemacks*, 50 F.3d 950 (11th Cir. 1995). Summary judgment on qualified immunity was found to be inappropriate in the following circumstances:

> Evidence before the district court showed that the Hartsfields' residence was distinguishable from Grooms's house. 5108 Middlebrooks was a corner house on a dead-end street, whereas 5128 Middlebrooks was further down the block; the two

> houses were separated by at least one other residence. Further, one witness testified that the Hartsfields' house differed in that it had a fence around it, and that Grooms's house had junk cars and the like strewn outside. Most important, it is uncontroverted that the entry occurred during daylight hours and that the house numbers were clearly marked. Moreover, there were no exigent circumstances involved; on the contrary, the raid had been carefully staged and the officers were accompanied by representatives of the media.

Hartsfield, 50 F.3d at 952.

In *Pray v. City of Sandusky*, 49 F.3d 1154, 1159 (6th Cir. 1995), the court "conclude[d] that the initial mistake in entering the Pray home was a reasonable one under the circumstances, and therefore, protected by qualified immunity." The issues of the reasonableness of the subsequent searches and seizures and the amount of force used, the resolution of which turned on when the police should have learned of their mistake, were, however, left for trial. In that case, the upper level of a duplex home was the object of a search warrant. The police entered and searched the lower level by mistake. The police had already searched the upper level six weeks before, pursuant to an earlier warrant. On the night of the mistaken search, the police entered the common vestibule and knocked on what they thought was the proper door, but there were no markings on the door. They broke the door down and began the search. As noted above, the act of entering the wrong apartment was found to be qualifiedly immune, and the real question became when the police should have recognized their mistake.

Appendix B

The facts of the instant case now can be examined. In preparation for the execution of the search and seizure warrant at about 10:00 p.m., Defendant Fairall, who was the supervising officer for the warrant execution; Cpl. Richard Speake, who was the team leader of the ERT; Det. Thomas, who was the investigating officer and had obtained the warrant; and members of the ERT met for a briefing on the execution of the warrant, at which point Defendant told the ERT the address of the residence to be searched. Defendant and Cpl. Speake made a drive by of the target residence. Defendant also asked for a physical description of the target residence from Det. Thomas, who described it as being the sixth door in from the end of the town house row and near a hexagonal window. Following the drive by, Defendant returned Cpl. Speake to where the ERT was waiting, and Defendant then went and waited outside the town house row in his vehicle to act as a lookout for the ERT. He identified what he believed to be the target residence by counting doors and locating the hexagonal window. Then, apparently wanting to verify that the address was correct, Defendant radioed to Cpl. Speake and asked "23 correct?"[2] Cpl. Speake apparently misunderstood and thought that Defendant was telling him that the proper address was 14823, and radioed back "23 correct?" to confirm that he heard Defendant correctly. Defendant took this as a confirmation of the correct address by Cpl. Speake. The ERT then arrived on the scene and entered Plaintiffs' residence.

The entry of Plaintiffs' home was thus due to a simple misunderstanding. Defendant took reasonable steps to ensure that the ERT was executing the warrant on the correct residence.

---

2. The address of the target residence was 14827 Belle Ami Drive, and the Plaintiffs' address is 14823 Belle Ami Drive. Both are in the same row of town houses.

It was nighttime and the house numbers were not easily visible. In identifying the residence to be entered, Defendant relied on the physical description of the investigating officer and on what he thought was confirmation of the correct address by the ERT team leader. Though the mistaken entry into Plaintiffs' home is regrettable, this is the sort of honest mistake for which qualified immunity protects police officers from personal liability. Defendant is thus entitled to summary judgment on Plaintiffs' claim arising out of his ordering the ERT to execute the warrant on their home.

2. DEFENDANT' S LIABILITY FOR CONDUCT OF ERT

Plaintiffs also allege that the search by the ERT was conducted in an unreasonable fashion which violated their Fourth Amendment rights. Specifically, Plaintiffs claim the ERT's actions were unreasonable because they failed to identify themselves verbally as police officers and because they did not wear uniforms with adequate identification.

Plaintiffs do not specify a theory under which Defendant can be liable for the conduct the ERT. In general, liability under 42 U.S.C. § 1983 will lie against an individual only if there is an affirmative showing that the officer charged acted *personally* in the deprivation of the plaintiff's rights. *Lopez v. Robinson*, 914 F.2d 486, 494 (4th Cir. 1990). Liability in a § 1983 action can, however, lie against a person under the theory of supervisor liability. *Slakan v. Porter*, 737 F.2d 368, 372 (4th Cir. 1984), *cert. denied*, 470 U.S. 1035 (1985). In certain limited situations, supervisory officials may be held liable for the constitutional injuries inflicted by their subordinates. *Id.* This theory of liability is premised on "a recognition that supervisory indifference or

tacit authorization of subordinates' misconduct may be a causative factor in the constitutional injuries they inflict on those committed to their care." *Id.* at 372-373. To establish supervisory liability under § 1983, three elements are necessary:

(1) that the supervisor had actual or constructive knowledge that his subordinate was engaged in conduct that posed "a pervasive and unreasonable risk" of constitutional injury to citizens like the plaintiff; (2) that the supervisor's response to the knowledge was so inadequate as to show "deliberate indifference to or tacit authorization of the alleged offensive practices;" and (3) that there was an "affirmative causal link" between the supervisor's inaction and the particular injury suffered by the plaintiff. *Shaw*, 13 F.3d at 799.

This clearly is not an appropriate case for imposing supervisor liability. Such liability is appropriate only where the subordinate's conduct is "widespread, or at least has been used on several different occasions." *Shaw,* 13 F.2d at 799 (citing *Slakan*, 737 F.2d at 373-74); *see also, id.* (noting that a supervisor's deliberate indifference may be shown by his "continued inaction in the face of documented widespread abuses") (citing *Slakan,* 737 F.2d at 373). In this case, Plaintiffs have not alleged that the members of the ERT have, at any time in the past, engaged in conduct violative of the Fourth Amendment, much less that such conduct was widespread or occurred on several different occasions. Plaintiffs have not alleged that Defendant knew of any such conduct by the ERT, much less that he approved of it or failed to take corrective action in the face of widespread abuses.[3] Therefore, even

3. Furthermore, Plaintiffs have not even alleged facts tending to show that Defendant is a "supervisory official" as that term is used in the supervisor liability context. *See Slakan,* 737 F.2d at 376

(Cont'd)

assuming that the ERT violated Plaintiffs' Fourth Amendment rights by the manner in which they conducted the search, Defendant is not liable to Plaintiffs for any resulting injury.[4]

4. LOSS OF CONSORTIUM

Plaintiffs assert no basis for their loss of consortium claim against Defendant other than their claims that their Fourth Amendment rights were violated by the mistaken entry of the ERT into their home and the manner in which the ERT conducted the search of their home. Because Defendant is not liable to Plaintiffs on those underlying claims, Defendant is also entitled to summary judgment on the loss of consortium claim.

(Cont'd)

(stating that liability ultimately is determined "by pinpointing the persons in the decisionmaking chain whose deliberate indifference permitted the constitutional abuses to continue unchecked"). There are no facts in the record indicating that Defendant had any responsibility whatsoever for members of the ERT except to the limited extent of supervising the particular warrant execution at issue in this case.

4. As to Plaintiffs' claim that the ERT's uniforms were unreasonable under the Fourth Amendment because they did not identify adequately the officers as police, Defendant also is not liable. Defendant was not in charge of outfitting the ERT. The uniforms worn were standard tactical entry uniforms recommended by the Federal Bureau of Investigation, the International Association of Chiefs of Police, and the Prince George's County Police Department.

Appendix B

III. CONCLUSION

For the foregoing reasons, Defendant's motion for summary judgment is GRANTED. A separate order will be entered.

s/ Deborah K. Chasanow
DEBORAH K. CHASANOW
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DENYING PETITION FOR REHEARING FILED MARCH 23, 1998

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 96-2448
CA-94-282-DKC

FILED March 23, 1998

BONNIE VELASCO; JAMIE VELASCO; DRU VELASCO, by and through her Mother, Bonnie Velasco; DARREN VELASCO, by and through his Mother, Bonnie Velaso

Plaintiffs - Appellants

v.

WILLIAM F. FAIRALL

Defendant - Appellee

On Petition for Rehearing with Suggestion
for Rehearing In Banc

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

Appendix C

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Patricia S. Connor
CLERK